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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 122

BETTY GANNETT TORMEY,
Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IMMIGRATION & NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Betty Gannett Tormey, petitions that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit dismissing for want of jurisdiction a petition for review of an order of the Board of Immigration Appeals denying petitioner's motion for reconsideration of a final order for her deportation.

OPINION BELOW

The Court of Appeals wrote no opinion. The opinion of the Board of Immigration Appeals denying petitioner's motion for reconsideration (R. 30)[1] appears in Appendix B, *infra*.

JURISDICTION

The order below (Appendix A, *infra*; R. 43) is dated and was entered on April 29, 1968. Jurisdiction is conferred on the Court by 28 U.S.C. 2350, made applicable to this proceeding by section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a).

QUESTIONS PRESENTED

1. In a review proceeding under section 106 of the Immigration and Nationality Act, initiated by a timely petition for review of an order of the Board of Immigration Appeals denying an alien's motion for reconsideration of a final order for her deportation, whether the reviewing court lacks jurisdiction to pass upon the constitutionality of the statute under which the alien was ordered deported because more than six months elapsed between the entry of the deportation order and the filing of the petition for review.

2. If the foregoing question is answered in the negative, whether section 241(a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(6)(C)(i)), which provides for the deportation of aliens on account of membership in the Communist Party of the United States, is unconstitutional on its face in the light of recent decisions of the Court, and whether *Galvan v. Press*, 347 U.S. 522, should therefore be overruled.

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[1] R. designates the record of proceedings in the court below, and is referred to by page number. A.R. designates the administrative record, and is referred to by document number, followed where appropriate by the page number of the cited document.

STATUTES AND REGULATION INVOLVED

Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provides in pertinent part as follows:

> (a) The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5 [now sections 2341-2351 of Title 28], shall apply to and be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this Title or comparable provisions of any prior Act, except that—
>
> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is later.

Section 241(a)(6)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(6)(C)(i), provides as follows:

> (a) Any alien in the United States (including an an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States
>
> * * *

8 C.F.R. § 3.2 provides in pertinent part as follows:

> The Board [of Immigration Appeals] may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by any party affected by the decision, shall be only upon written motion to the Board. * * * A motion to reopen or a motion to

reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. * * *

STATEMENT OF THE CASE

Petitioner, a native of Poland, was admitted to the United States in 1914, at the age of eight, and has resided here ever since (A.R. 11, p. 2).

On October 15, 1951, she was ordered deported pursuant to what is now section 241(a)(6)(C)(i) of the Immigration and Nationality Act (the Act) as an alien who was, after entry, a member of the Communist Party of the United States. The order became final on October 31, 1952 when it was sustained by the Board of Immigration Appeals (the Board). (A.R. 11.)

On July 19, 1967, petitioner filed with the Board a motion for reconsideration of its 1952 order on the ground that recent decisions of the Court have established that section 241(a)(6)(C)(i) is unconstitutional and have, in effect, overruled *Galvan v. Press*, 347 U.S. 522, sustaining the constitutionality of that section (A.R. 10). The motion was made pursuant to 8 C.F.R. 3.2 which permits motions for reconsideration to be filed at any time so long as the alien has not departed the United States.[2]

On October 9, 1967, the Board denied petitioner's motion on the ground that, "It is not within the jurisdiction of this Board or the special inquiry officer to pass upon the constitutionality of a statute which we administer" (Appendix B, *infra*, R. 31). The Board, *sua sponte*, also reexamined the evidence and concluded (*ibid.*) that, "it is clear from

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[2]The motion alleged that petitioner has not departed (A.R. 10, p. 1). The fact is that because of the refusal of Poland and other countries to receive petitioner, the Service has been unable to effect her deportation.

the record that the respondent's membership in the Communist Party was not a nominal one."[3]

On November 22, 1967, petitioner filed a petition for review by the court below, pursuant to section 106 of the Act, of the Board's order of October 9, 1967, denying her motion for reconsideration. The petition, like the motion, asserted as grounds for relief the unconstitutionality of the statute under which petitioner was ordered deported (R. 28).

On April 29, 1967, on motion of the Service (R. 32), the court below summarily dismissed the petition for review "for lack of jurisdiction" (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

Petitioner submits that certiorari should be granted to review both the decision below finding lack of jurisdiction, which is in conflict with applicable decisions of this Court, and the important constitutional questions which the court below did not reach.

I. Jurisdiction

The decision below dismissing the petition for review for lack of jurisdiction is contrary to *Giova v. Rosenberg*, 379 U.S. 18, and *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276.

Giova held that an order of the Board denying a motion to reopen or reconsider a final deportation order is reviewable under section 106(a) of the Act by a petition for review filed within six months from the date of the denial of the motion. The Service contended below, however, that since petitioner filed her petition for review more than

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[3] In an affidavit filed in the court below, petitioner disclaimed any contention that the evidence was insufficient to satisfy the statute and acknowledged her active membership in the Communist Party both before and since the issuance of the deportation order (R. 40-41).

six months after entry of the order for her deportation, the current validity of that order is not reviewable. All that is open to review, according to the Service, is the correctness of the Board's finding, in denying the motion for reconsideration, that it lacks jurisdiction to pass upon the constitutionality of a statute that it administers (R. 34-35).

The Court rejected this argument when advanced by the Service in *Woodby, supra.* As appears from the opinion of the Court of Appeals in that case, 370 F.2d 989, the alien, who had not sought judicial review of the order for her deportation, moved for administrative reconsideration on the ground that the evidence as to deportability was insufficient. Within six months after the denial of that motion, but more than six months after the deportation order, she petitioned for judicial review. The Service contended, as it did here, that the lapse of more than six months after entry of the deportation order precluded consideration of the order's validity, and limited review to the Board's "discretionary denial of the motion to reconsider" (370 F.2d 992). The Court of Appeals (*ibid.*) found it unnecessary to pass upon this contention inasmuch as it held the evidence sufficient to support the underlying deportation order.

This Court reversed, enunciating a strict standard for proof of deportability which had not been applied below. The majority opinion does not mention the jurisdictional question, evidently—as appears from the dissenting opinion (at 291 and n. 2)—because the Court deemed the issue settled by *Giova.*

Under *Woodby*, petitioner could have secured judicial review of the validity of the 1952 order for her deportation had her motion for reconsideration been grounded on failure of the evidence to satisfy the strict standard of proof which the Court announced in that case. Plainly, therefore, she is entitled to judicial review of the order's validity on the more fundamental ground that the statute which authorized it fails to measure up to constitutional standard enunciated in other recent decisions of the Court.

The effect of *Woodby* and *Giova* is simply to apply to deportation proceedings the uniform rule that where a motion for reconsideration or rehearing of an administrative order has been timely filed under the rules of the agency, the statutory period within which to petition for judicial review of the underlying order runs, not from the date of its entry, but from the date of the denial of the motion. *E.g., Robert Louis Stevenson Apts., Inc. v. CIR,* 337 F.2d 681 (Tax Court); *Montship Lines Ltd. v. Fed. Maritime Board,* 295 F.2d 147, 151; *Samuel Franklin & Co. v. SEC,* 290 F.2d 719, 720-25; *Albertson v. FCC,* 182 F.2d 397. The same principle governs the timeliness of appeals and petitions for certiorari to this Court. *United States v. Healy,* 376 U.S. 75, 77-80.

Other agencies and the courts have adopted rules of practice establishing time-bars on motions for rehearing or reconsideration. *E.g.,* Tax Court Rule 19(e) and (f); SEC Rule 21(e); FCC rule, 47 C.F.R. 1.106; Second Circuit Rule 25. The Attorney General, for whatever reason, has not seen fit to follow suit in regulations applicable to the Service. 8 C.F.R. 3.2, 3.8, 242.22. Under these regulations, a motion to reconsider is therefore available to an alien, so long as he does not depart the country,[4] as a means of securing judicial review of the order for his deportation. "We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Court of Appeals." *Foti v. Immigration & Naturalization Service,* 375 U.S. 217, 229-30.

The effect of the decision below is to bar deportees in petitioner's situation from securing judicial consideration of the current validity of the orders for their deportation. Section 106 makes review by petition to the Court of Ap-

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[4] The regulations preclude motions for reconsideration after departure, and section 106(c) places a similar limitation on petitions for review.

peals "the sole and exclusive procedure" for the judicial review of a deportation order against an alien who is not in custody under the order.[5]

Plaintiff is not in, and cannot be taken into, custody under the 1952 order. For the authority of the Attorney General to detain her expired six months after the order was entered. Section 242(c) of the Act. She is, however, under onerous conditions of "supervision"—tantamount to parole—by the Attorney General pursuant to section 242(d),[6] and she may yet be deported after a lifetime in this country (n. 2, *supra*).

Petitioner's contention that the statute under which these hardships have been imposed is invalid under current standards of constitutionality is substantial (point II, *infra*). The decision below foreclosing judicial consideration of that contention is therefore not only in conflict with the interpretation of section 106 in *Giova* and *Woodby*, but flouts the principle that deportation statutes should be construed "generously to the alien." *Haw Tan v. Phelan*, 333 U.S. 6, 10, quoted in *Costello v. Immigration & Naturalization*, 376 U.S. 120, 128.

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[5] Aliens in custody may proceed by habeas corpus. Section 106(a)(9).

[6] Petitioner's current conditions of supervision, among other things, prohibit travel outside of New York State for more than 48 hours without advance notice to the Service of her itinerary, and require her to report in person at the office of the Service four times a year. Petitioner and others have instituted proceedings to enjoin enforcement of these requirements. *Dymytryshyn v. Esperdy*, No. 66, Civ. 2375, S.D.N.Y. All parties to that action agree that, because of section 106, the validity of the underlying deportation orders may not be litigated there.

II. Constitutionality

The immediate constitutional question which this case presents is whether the 1954 decision in *Galvan v. Press, supra,* sustaining section 241(a)(6)(C)(i) (the Statute) has continuing authority in the light of subsequent decisions rejecting the premises on which it was based. Underlying this, as we show below, is the fundamental question whether statutes for the deportation of resident aliens are to continue to enjoy the exemption granted them by *Galvan* from the constitutional limitations on the legislative power guaranteed by substantive due process, the First Amendment, and the prohibition against bills of attainder and *ex post facto* laws.

The fact that the case was disposed of below on the motion to dismiss is no bar to decision of the constitutional questions here. *Kendall v. Ewart*, 259 U.S. 139. See also, *Cole v. Ralph*, 252 U.S. 286, 290; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 567-68; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214; *Ecker v. Western Pacific Ry. Corp.*, 318 U.S. 448, 489. Indeed, the Court has upon occasion decided an important constitutional question which was not even raised, let alone considered, below. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-37 (overruling *Ex parte Bakelite Corp.*, 279 U.S. 438, and *Williams v. United States*, 289 U.S. 553); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 466.

There are compelling reasons for including the constitutional question in the grant of certiorari here. If the Court rules with petitioner on the jurisdictional question, it would serve no conceivable purpose to remand the case for consideration of the merits. At issue is the constitutionality of the Statute on its face, unincumbered by any question of fact which, if present, might usefully be resolved below. Moreover, the court below would doubtless deem itself bound by *Galvan* and thus impotent to take a fresh look at the constitutional issues which, petitioner urges, require

reexamination. Accordingly, a remand for consideration of these issues would be a futility.[7]

We turn therefore to a review of *Galvan* and to the later decisions which have eroded its authority.

A. *Galvin* reviewed.

Galvin first addressed itself to a question of statutory construction, and held (at 528) that the Statute applies to all members of the Communist Party, irrespective of their lack of knowledge of unlawful organizational purposes and of an intent to further such purposes.[8]

The Court (Justices Black and Douglas dissenting) went on to sustain the Statute as applied even to an alien whose membership had terminated prior to its enactment.[9] The opinion did so without mentioning the First Amendment and bill of attainder issues which the Statute plainly presents. And it avoided plenary consideration of challenges under the due process and *ex post facto* clauses, stating (at 530-31) that while much could be said in their favor, "were we writing on a clean slate," both were foreclosed by prior decisions. The opinion continued (at 531, citations and ftn. omitted):

> "As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive

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[7]It was perhaps recognition of this fact that influenced the court below in granting the motion to dismiss without awaiting argument on the merits.

[8]In this respect the decision accords with *United States v. Robel*, 389 U.S. 258, 262, and *Aptheker v. Secretary of State*, 378 U.S. 500, 515.

[9]Petitioner's membership commenced before enactment of the Statute and has continued ever since (R. 41). Hence her case presents no question under the *ex post facto* clause.

> Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."[10]

The Court has had no previous occasion to reexamine the result reached in *Galvan*.[11] But later related decisions have invalidated the conclusion that the Statute is constitutional. We show in what follows that this has been the case with respect to the due process issue which the opinion sidestepped and the bill of attainder and First Amendment issues which it ignored.

B. Substantive due process

Under *Galvan*, the Court lacks authority to invalidate a law for the deportation of resident aliens, even though drawn along blatantly racist lines.[12] This view of the limitations on the judicial power is unacceptable under contemporary constituional standards for at least two reasons:

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[10]The reasoning behind this "unbroken rule," as appears from the preceding paragraph of the opinion, was that deportation does not constitute punishment.

[11]The constitutional questions were avoided in *Rowoldt v. Perfetto*, 355 U.S. 115, by holding the evidence insufficient to establish that the alien's membership was "meaningful." And consideration of these questions was again made unnecessary in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, by the holding (at 479-80) that evidence of "dues paying membership and sometime attendance at Party meetings" is not enough to satisfy the *Rowoldt* standard.

[12]"But whether the immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress." *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (concurring opinion of Justice Frankfurter).

1. Assuming that the result in *Galvan* is supported by the "whole volume" of history to which it deferred,[13] its evasion of the merits of a constitutional question by an appeal to *stare decisis* has been repudiated in case after case. *E.g., Baker v. Carr*, 369 U.S. 186, overruling *Colegrove v. Green*, 328 U.S. 549; *Afroyim v. Rusk*, 387 U.S. 253, overruling *Perez v. Brownell*, 356 U.S. 44; *Malloy v. Hogan*, 378 U.S. 1, overruling *Adamson v. California*, 332 U.S. 46; *Murphy v. Waterfront Commission*, 378 U.S. 52, overruling *Knapp v. Schweitzer*, 357 U.S. 371, and *Feldman v. United States*, 322 U.S. 487; *Mapp v. Ohio*, 367 U.S. 643, overruling *Wolf v. Colorado*, 338 U.S. 25; *Camara v. Municipal Court*, 387 U.S. 523, overruling *Frank v. Maryland*, 359 U.S. 360; *Chef v. Schnackenburg*, 384 U.S. 373, overruling *Green v. United States*, 356 U.S. 165; *Keyishian v. Board of Regents*, 385 U.S. 589, overruling *Adler v. Board of Education*, 342 U.S. 485.

Indeed, *Galvan's* uncritical deference to precedent was anomalous even in its time. Only a week earlier, the Chief Justice had written for an unanimous Court that, "In approaching this problem [of racial segregation], we cannot turn the clock back to . . . 1896 when *Plessy v. Ferguson* was written." Yet a week later, the majority in *Galvan* turned the clock back to *Fong Yue Ting v. United States*, 149 U.S. 698, a Chinese Exclusion Act case of *Plessy's* vintage, for the rule which it held controlling.[14]

2. The Court has rejected the major premise of the decisions on which *Galvan* relied. The premise, as *Galvan*

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[13] But see Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien, 68 Yale L. Jour. 1578, 69 *id.* 262; Bullitt, Deportation as a Denial of Substantive Due Process, 28 Wash. L. Rev. 205; Constitutional Restraints on the Expulsion and Exclusion of Aliens, 37 Minn. L. Rev. 440 (Note); Boudin, The Settlor Within Our Gates, 26 N.Y. Univ. L. Rev. 266, 451, 634.

[14] See Justice Douglas' discussion of the case in his dissent in *Harisiades v. Shaughnessy*, *supra*, at 598-600.

explained (at 531), is that, "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," and hence are "entrusted exclusively to Congress."

Subsequent to *Galvan*, *Baker v. Carr*, *supra*, upon re-examining the nature of "political questions," overruled *Colegrove v. Green*, *supra*, and held that a constitutional challenge to the apportionment of a state legislature is justiciable. Deportation laws are obviously not so "peculiarly concerned with the political conduct of government" as are legislative districting statutes. Contrary to *Galvan*, therefore, an attack on the Statute as a denial of substantive due process presents a justiciable question.

On the merits, the due process issue is governed by *Aptheker v. Secretary of State*, 378 U.S. 500, invalidating section 6 of the Subversive Activities Control Act under which citizens were denied passports solely on account of their membership in the Communist Party. The Court ruled (at 510) that this sanction "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." The sanction of the Statute is identically broad and indiscriminate. Consequently, if the guarantee of due process protects aliens and citizens alike, the Statute cannot stand.

C. Attainder.

While there is no mention of attainder in *Galvan*, its ruling on the *ex post facto* issue appears dispositive of attainder as well. For both questions turn on whether deportation constitutes "punishment."[15] *Galvan* acknowledged (at 531) that the consequences of deportation are "close to punishment for crime." But it adhered to what it termed (*ibid.*) "the unbroken rule of this Court" that the *ex post facto* clause "applies only to prosecutions for crime" and "has no application to deportation."

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[15] Punishment is a common ingredient of bills of attainder and *ex post facto* laws. *Cummings v. Missouri*, 4 Wall. 277, 323, 325-26.

Subsequent to *Galvan*, as we have shown, the Court has discarded this sterile reliance on *stare decisis* in its approach to constitutional questions. Furthermore, *Galvan's* conclusion that the Statute is not punitive, at least within the meaning of the prohibition against bills of attainder, is irreconcilable with *United States v. Brown*, 381 U.S. 437.

Brown involved the constitutionality of section 504 of the Landrum-Griffin Act, which prohibited members of the Communist Party from serving as officers or employees of labor unions. The Court invalidated the section as a bill of attainder, the decision turning on whether the prohibition of section 504 constituted "punishment."[16]

The Court held first (at 457-58) that the section had the retributive feature characteristic of punishment since it applied to past as well as to present membership. The Statute has the same feature. The Court went on to rest its decision on broader grounds which it summarized (at 461):

> "We do not hold today that Congress cannot weed dangerous persons out of the labor movement . . . Congress must accomplish such results by rules of general application. It cannot specify the people upon whom the sanction it prescribes is to be levied."

So, too, while Congress may weed dangerous aliens out of the country, it must do so by rules of general application, and not as in the Statute by specifying the people who are to be deported.

D. The First Amendment.

Nothing in *Galvan* indicates whether omission of any reference to the First Amendment stemmed from a belief that deportation statutes need not conform with First

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[16]The section indisputably had all of the other indicia of bills of attainder, as is the case with the Statute. See *Brown*, at 448-5[illegible]

Amendment requirements,[17] or from the conclusion that the Statute satisfies these requirements. On either ground, the decision is incompatible with later rulings of the Court.

The reasoning (*supra*) that makes petitioner's substantive due process challenge to the Statute justiciable applies with like force to the First Amendment issue.

On the merits, decisions since *Galvan* establish that the Statute violates the First Amendment for two reasons:

1. Legislation, like the Statute, which sanctions membership in the Communist Party, unaccompanied by knowledge of an unlawful organizational purpose, intent to effectuate this purpose and activity to that end, violates the First Amendment, even if it is assumed that the Party incites violent overthrow of the government. *United States v. Robel*, 389 U.S. 258; *Keyishian v. Board of Regents*, 385 U.S. 589;[18] *Elfbrandt v. Russell*, 384 U.S. 11.

2. The assumption, implicit in the Statute, that the Communist Party incites violent overthrow is without justification in fact. *Yates v. United States*, 354 U.S. 298, 329-30; *Noto v. United States*, 367 U.S. 290, 299. Moreover, the Statute's "short-cut procedure," by eliminating the opportunity for a hearing on the nature of the Party's advocacy, itself violates the First Amendment. *Speiser v. Randall*, 357 U.S. 513, 529.[19]

[17] The majority in *Harisiades v. Shaughnessy*, *supra*, was evidently divided on the question, Justice Jackson, who wrote the majority opinion, assumed (at 592) that First Amendment limitations were applicable. Justice Frankfurter, however, stated (at 597, concurring opinion) that the grounds designated by Congress for deportation are "*wholly* outside the power of this Court to control" (emphasis supplied).

[18] Overruling *Adler v. Board of Education*, *supra*, because (at 605) "constitutional doctrine which has emerged since that decision has rejected its major premise."

[19] It also violates procedural due process which, as *Galvan* acknowledges (at 531), is applicable to deportation statutes. *United States v. Carolene Products Co.*, 304 U.S. 144, 152; *Morgan v. United States*, 304 U.S. 1; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-174, 175-79 (concurring opinions).

CONCLUSION

Certiorari should be granted to review both of the questions presented.

Respectfully submitted,

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New York, New York 10007
Attorney for Petitioner

APPENDIX A
[Order Below]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and sixty-eight.

Betty Gannett Tormey, Petitioner

v.

Immigration and Naturalization Service, Respondent.

It is hereby ordered that the motion made herein by counsel for the respondent by notice of motion dated April 22, 1968, to dismiss the petition for review for lack of jurisdiction or, in the alternative, for a remand be and it hereby is granted, and that the petition for review be and it hereby is dismissed for lack of jurisdiction.

It is further ordered that the issuance of the mandate be and it hereby is stayed pending a petition for a writ of certiorari pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk

* * *

Before: Hon. Sterry R. Waterman,
Hon. Henry J. Friendly,
Hon. Irving R. Kaufman,
Circuit Judges

APPENDIX B

[Opinion of Board of Immigration Appeals]

CHARGES:

Order: Section 241(a)(6)(C), I&N Act (8 USC 1251(a)(6)(C))—After entry a member of the Communist Party of the United States

Lodged: None

APPLICATION: Reopen the proceeding

The respondent, a native of Poland, has been found deportable as an alien who after entry was a member of the Communist Party of the United States. A warrant for her deportation was issued on October 31, 1952 and is outstanding. Counsel moves for a reopening of the proceeding to test the constitutionality of Section 241(a)(6)(C) of the Immigration and Nationality Act. The trial attorney has submitted a brief in opposition to the motion.

It is not within the jurisdiction of this Board or the special inquiry officer to pass upon the constitutionality of a statute which we administer. Furthermore, it is clear from the record that the respondent's membership in the Communist Party of the United States was not a nominal one which would bring it within the rule set forth in *Galvan v. Press* (347 US 522) and *Rowoldt v. Perfetto* (355 US 115). The motion will be denied.

ORDER: It is ordered that the motion be and the same is hereby denied.

Chairman

SUPREME COURT, U. S.
No. 122
FILED
JUL 9 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

BETTY GANNETT TORMEY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion. Its order dismissing for want of jurisdiction appears at Pet. App. 17. The opinion of the Board of Immigration Appeals denying petitioner's motion for reconsideration of the order dismissing her appeal from the order of deportation (R. 30; A.R. 8)[1] appears at Pet. App. 18.

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[1] "R." refers to the record of the proceedings in the court of appeals. "A.R." refers to the numbered tabs on the documents constituting the administrative record; where the reference is to a particular page of a document, the page number follows.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1968 (R. 43; Pet. App. 17). The petition for a writ of certiorari was filed on May 23, 1968. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirement of Section 106(a) of the Immigration and Nationality Act that a petition for review of a final order of deportation be filed within six months of the entry of the order or of the effective date of the section (whichever is later) can be circumvented by filing with the administrative authorities, years after the expiration of the period prescribed, a motion to reconsider the deportation order, and then attempting to litigate the validity of the original order on petition for review of the order denying reconsideration.

STATUTE INVOLVED

Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)), as added by the Act of September 26, 1961, § 5(a), 75 Stat. 651, provides in pertinent part:

> Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq. [now 28 U.S.C. 2341-2351]), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made

against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act [8 U.S.C. 1252(b)] or comparable provisions of any prior Act, except that—

> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section [October 26, 1961], whichever is the later.

* * * *

STATEMENT

Petitioner is a 61-year-old native of Poland who was admitted to the United States in 1914 at the age of eight. Except for several months spent in Europe in 1927 and 1928, she has resided in this country ever since (A.R. 11, p. 2; A.R. 13, pp. 2-3). On October 15, 1951, pursuant to what is now Section 241 (a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251 (a)(6)(C)(i)),[2] she was ordered deported as an alien who, after entry, had been a member of the Communist Party of the United States (A.R. 13).[3] The order became final on October 31,

---

[2] The deportation order was actually entered under Sections 1(2)(C)(i) and 4(a) of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008 (8 U.S.C. (1946 ed., Supp. V) 137(2)(C)(i) and 137-3(a)). The relevant provisions have been superseded without pertinent change by the cited provision of the present Immigration and Nationality Act.

[3] In an affidavit filed with the court below in the present proceeding, petitioner acknowledged that she had been an active member of the Party for many years prior to the issuance of the deportation order, had served on its leading committees, and had continued her active membership to the present time (R. 41). She was one of the members of the

1952, when it was sustained by the Board of Immigration Appeals (A.R. 11). Judicial review was not sought (R. 34). Because of the refusal of Poland, the country to which she was ordered deported, to receive petitioner, the United States has not been able to enforce the order (see Pet. 4, n. 2).[4]

On July 19, 1967, petitioner filed with the Board of Immigration Appeals a motion that it reconsider its 1952 order sustaining the deportation order (A.R. 10). The stated basis of the motion was that Section 241(a)(6)(C)(i)—the statutory basis for the order—is unconstitutional (A.R. 10, pp. 1-2). Acknowledging that the constitutionality of the section had been sustained by this Court in *Galvan* v. *Press*, 347 U.S. 522, petitioner argued that the decision was indefensible and, if reexamined, would be overruled (A.R. 10, p. 3). On October 9, 1967, the Board denied the motion on the ground that it was "not within the jurisdiction of this Board * * * to pass upon the constitutionality of a statute which we administer" (R. 30; A.R. 8; Pet. App. 18).[5]

Party whose convictions for conspiring to violate the Smith Act, 18 U.S.C. 2385, were affirmed in *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909 (R. 36-37). She is currently the editor of *Political Affairs*, the Party's theoretical journal (R. 41).

[4] There is no prospect, moreover, although the record does not specifically so indicate, that the now 15-year-old deportation order can be enforced, either in the immediate or foreseeable future.

[5] As petitioner notes (Pet. 4), the Board "*sua sponte*, also reexamined the evidence" and determined that it was in any event clear from the record that petitioner's membership in the Communist Party had not been "a nominal one which

On November 22, 1967, relying on Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) (pp. 2-3, *supra*), petitioner filed in the court of appeals a petition for review of the Board's October 9, 1967, order denying the motion for reconsideration (R. 28-29). Like the motion addressed to the Board, the petition challenged the constitutionality of the statute on which the deportation order had been predicated (R. 29). The Immigration and Naturalization Service moved to dismiss the petition for lack of jurisdiction (R. 32-38).[6] The Service noted that the petition for review, while in form seeking review of the denial of the motion for reconsideration, was in

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would bring it within the rule set forth in *Galvan* v. *Press* (347 U.S. 522) and *Rowoldt* v. *Perfetto* (355 U.S. 115)" (R. 30; A.R. 8; Pet. App. 18). See note 3, *supra*, p. 3.

[6] Alternatively the Service asked that the proceeding be remanded to the Board of Immigration Appeals for reconsideration of the deportation order in the light of the new standard of proof ("clear, unequivocal, and convincing evidence") by which this Court, in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285, had recently held that deportation orders must be supported (R. 35-38). Petitioner opposed the request on the ground that the evidence in her case had clearly met the *Woodby* standard and that remand for the purpose suggested was therefore unnecessary (R. 40). (Petitioner had also opposed the Service's earlier motion that the Board reopen the deportation proceeding in order to bring the record current, to enable the Board to reappraise the evidence in the light of the *Woodby* standard, and to permit petitioner to apply for such discretionary relief from deportation for which she might deem herself qualified (A.R. 6-7).) In light of its decision to dismiss for lack of jurisdiction, the court below had no occasion to consider the alternative request. Petitioner now reaffirms her position that her acknowledged, continuing, active membership in the Communist Party removes any issue about the sufficiency of the evidence to satisfy the statute.

substance a challenge to the order of deportation itself, based on the alleged invalidity of the statute on which the order was based (R. 34-35).[7] Further pointing out that a petition for review of a deportation order is required by Section 106(a) to be filed within six months of the order or of the effective date of the section (whichever is later) and that the petition in this instance had been filed more than 15 years after the entry of the order and more than six years after the section had become effective, the Service contended that the petition was barred by untimeliness (R. 34, 38).

On April 29, 1967, the court granted the Service's motion and dismissed the petition for lack of jurisdiction (R. 43; Pet. App. 17).

ARGUMENT

The court of appeals was correct in holding that it lacked jurisdiction to entertain the petition for review. It is therefore unnecessary for this Court to reach the second question which petitioner seeks to raise—whether *Galvan* v. *Press*, 347 U.S. 522, upholding the constitutionality of Section 241(a)(6)(C)(i) of the Immigration and Nationality Act, should be overruled.[8]

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[7] The Service pointed out that petitioner could not "seriously challenge" the correctness of the denial of the motion for reconsideration since it was indisputably beyond the Board's power to hold invalid an Act of Congress which it administers (R. 34-35). Petitioner makes no attempt before this Court to suggest that there is any basis for attacking the Board's reasons for denying reconsideration.

[8] Petitioner has specifically disclaimed any contention, in light of her admittedly "active", current membership in the

Section 106(a) of the Immigration and Nationality Act—which provides the exclusive procedure for judicial review in this field and on the basis of which petitioner invoked the jurisdiction of the court below—provides that a petition for review of a final order of deportation may be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." The challenged deportation order became final on October 31, 1952, fifteen years prior to the filing of the petition for review, and the section took effect on October 26, 1961 (see § 5(b), 75 Stat. 653), six years before she filed her petition for review. While the petition for review purported to seek review of the Board's denial of the motion for reconsideration, it is evident, as the court of appeals recognized and as we have seen (note 7, *supra*, p. 6), that the real challenge was solely to the deportation order itself. The only ground relied on in seeking reconsideration was that the Board should reconsider the deportation order in the light of petitioner's contention that the statute on which it was based is unconstitutional. Since such a ruling is not seriously expected from the Board with respect to a statute which it administers, it is evident

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Party, that the evidence was insufficient to bring her within the statute. Since *Galvan*, of course, the Court has made the "membership" test of the statute more stringent, see *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, 476-477, so that it clearly comports with recent expression of constitutional standards. *E.g.*, *United States* v. *Robel*, 389 U.S. 258, 265-266. In denying reconsideration, the Board found that the evidence met these restrictive tests (Pet. App. 18).

that the sole purpose of the motion for reconsideration was to use it as a device to circumvent the explicit and unqualified time limitation on petitions for review set by Congress. Even a good-faith motion to reopen or reconsider, if filed *after* the time for seeking review of the deportation order has expired, cannot revive the right to seek such review. *Lopez* v. *Immigration and Naturalization Service*, 356 F. 2d 986 (C.A. 3), certiorari denied, 385 U.S. 839; *Chul Hi Kim* v. *Immigration and Naturalization Service*, 357 F. 2d 904, 906 (C.A. 7).[9]

Petitioner's reliance (Pet. 5) on *Giova* v. *Rosenberg*, 379 U.S. 18, and *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, and the government's position in those cases, is misplaced.

As this Court recently explained in *Cheng Fan Kwok* v. *Immigration and Naturalization Service* (No. 638, October Term, 1967, issued June 10, 1968) (slip op. pp. 5-6), *Giova* involved a question quite distinct from that here at issue; there, the question was whether the court of appeals was the proper *forum* for review of decisions denying reconsideration of deporta-

[9] While review of the deportation order proper is foreclosed in such circumstances, review may be had of the denial of the ancillary motion if the petition is filed within six months. *Giova* v. *Rosenberg*, 379 U.S. 18; *Lopez* v. *Immigration and Naturalization Service, supra; Chul Hi Kim* v. *Immigration and Naturalization Service, supra*, at 907. And see discussion in the text immediately following. But the issue in such a proceeding is solely whether, under all the circumstances, it was an abuse of discretion to deny the motion. Petitioner does not, and obviously could not, contend that it was an abuse of discretion for the Board to deny the motion for reconsideration in this case.

tion orders. With the agreement of the government, the Court held in *Giova* that an order of the Board refusing to reopen a deportation proceeding or to reconsider a final order of deportation is reviewable in a court of appeals under Section 106(a) by a petition for review filed within six months of the denial of the motion. There is, however, nothing in the Court's brief *per curiam* order in the case which supports petitioner's claim that the filing of a motion to reopen or reconsider revives the right of the alien to obtain review of the deportation order proper once the right to such review has expired. The government, indeed, in its brief to this Court in the *Giova* case, while urging the interpretation of Section 106(a) which the Court accepted, expressly disavowed the interpretation which petitioner now urges. "It should be noted," we there said (Brief for Respondent, No. 23, Oct. Term, 1964, p. 21, n. 20),

> that the construction of Section 106(a) suggested by the government does *not* permit circumvention of the six-month limitations period prescribed for the filing of petitions for review (§ 106(a)(1) * * *). If, after entry of a final order of deportation, an alien fails to seek review of the order within six months, he cannot thereafter revive his right to review of that order merely by filing a motion to reopen the proceedings. Review under Section 106(a) of the denial of a motion to reopen is limited, in other words, under the government's interpretation, to the propriety and legality of the order of denial itself. * * * [Emphasis in the original.][10]

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[10] We further noted that while the petitioner in *Giova* had in fact not sought review of the deportation order proper,

Woodby, like the present case, involved a petition for review which had been filed more than six months after the Board of Immigration Appeals upheld the deportation order (thus making it final) but within six months of the denial of a motion to reconsider. Unlike this case, however, the motion for reconsideration in *Woodby* was filed within six months of the Board's affirmance of the deportation order—at a time when the statutory period within which review must be sought had not yet expired.[11] In *Woodby*, the Service argued in the court of appeals that because of the six-month limitation imposed by Section 106 (a) (1) the court's review authority was limited to the propriety of the denial of the motion for reconsideration—whether, in other words, the denial of the motion had involved an abuse of discretion. 370 F. 2d at 992. The court of appeals found it unnecessary to consider the suggested limitation on its jurisdiction because it found without merit the attack on the deportation order as well as the challenge to the denial of the motion for reconsideration. *Ibid.* In this Court, noting that another court of appeals had in the

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he *could* have done so (notwithstanding that the order had been entered more than four years previously) because of the fortuitous circumstance that the petition for review had been filed within six months of the effective date of Section 106(a) (Brief, p. 20, n. 19).

[11] The Board's order upholding the *Woodby* deportation order (by which the deportation order became final) was entered on March 8, 1963. The motion for reconsideration was filed prior to May 27, 1963, and denied on that date. 385 U.S. at 286, n. 20.

interim held[12] that it had jurisdiction to review the deportation order as well as the denial of the ancillary motion (there a motion to reopen), the Service abandoned its contention that *in circumstances similar to those presented* the courts are limited to reviewing the denial of the ancillary motion. Brief for Respondent, No. 40, October Term, 1966, p. 8, n. 3. This Court accepted the Service's concession, also citing *Bregman*. 385 U.S. at 286-287, n. 20.

That the government did not intend by its *Woodby* concession to retreat from its insistence in *Giova* that an alien who fails to seek review of a final deportation order within the time limit prescribed by Congress cannot revive his right to review merely by filing a motion to reopen or reconsider, and that this Court, by its acceptance of the concession, did not intend to give sanction to so facile a circumvention of the statutory limitation, is clear from the precisely enunciated holding of the *Bregman* decision, upon which both the concession and the Court's acceptance of it were predicated. What *Bregman* held was that, in the words of the opinion (351 F. 2d at 402-403),

> *if the motion to reopen before the Board is within six months of the final order of deportation and* the petition to this court is within six months of the denial of the motion (as it was in this case), this court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen. [Emphasis added.][13]

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[12] *Bregman* v. *Immigration and Naturalization Service*, 351 F.2d 401 (C.A. 9).

[13] A further and equally clear indication that the government did not intend its *Woodby* concession to extend to a

This reasonable construction of Section 106(a)(1) gives due consideration both to the rights of the alien and to the time limit which Congress wrote into the section. It gives to the alien against whom a final order of deportation has been entered and who desires to seek judicial review an opportunity first to attempt to obviate the need for such review by promptly petitioning the administrative authorities to reconsider their decision (or to reopen the proceedings for some *bona fide* purpose, such as the presentation of additional evidence). In such a context it is quite reasonable to consider the resort to administrative relief as extending the time for seeking judicial review of the underlying order—review which was at the time equally available. As the Court recognized in *United States* v. *Healy*, 376 U.S. 75, 77—another case on which petitioner erroneously seeks to rely (Pet. 7)—enlargement of the time to take a case to the court of appeals when a petition for reconsideration is filed within that time is decisively distinguishable from "an attempt to rejuvenate an extinguished right to appeal."

The construction we urge is thus at once generous to the alien's right to review while remaining true to

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situation where, as here, the ancillary motion is filed *after* the time for petitioning for review of the deportation order has expired is the fact that immediately following its concession (Brief, p. 8, n. 3) the government cited as a "Compare" reference the case of *Lopez* v. *Immigration and Naturalization Service*, 356 F.2d 986 (C.A. 3), certiorari denied, 385 U.S. 839, in which (as noted at p. 8, *supra*) it had been held, in precisely these circumstances, that the filing of the ancillary motion does not revive the right to seek review of the principal order.

the spirit if not the letter of the time limit Congress has seen fit to impose. On the other hand, under the interpretation of Section 106(a)(1) which petitioner espouses, the statutory time limit can be circumvented with ease and becomes, in fact, nugatory. All that is necessary to evade it is for the alien—at any time and under any pretext—to petition the administrative authorities to reconsider their decision or to reopen the proceedings, and then, when, as expected, the motion is denied, to use the order of denial as a means of "rejuvenat[ing] an extinguished right." Clearly, nothing in either *Giova* or *Woodby* supports that construction.[14]

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[14] It is appropriate to note, however, that, while petitioner is thus foreclosed from seeking review of the deportation order at this time under the review procedure established by Section 106(a), there would be nothing to prevent her, if deportation ever becomes feasible and she is taken into custody for that purpose, from pursuing the habeas corpus remedy preserved under the Act for those in custody. See Section 106(a)(9) and (c) (8 U.S.C. 1105a(a)(9) and (c)). (We also brought this alternative to the Court's attention in our brief in the *Giova* case at p. 21, n. 20). Inasmuch as she has never previously sought judicial review of her deportation order, the validity of the order could be litigated in such a proceeding on any ground she might choose to advance. Cf. Section 106(c) (8 U.S.C. 1105a(c)). As we have previously indicated, however, there is no foreseeable prospect that the 15-year-old deportation order can be enforced.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1968.

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IN THE

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BETTY GANNETT TORMEY, *Petitioner,*

v.

IMMIGRATION & NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY FOR PETITIONER

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IMMIGRATION & NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY FOR PETITIONER

1. Jurisdiction

The Service agrees that the six months time bar of section 106(a) on petitions for review of deportation orders should not be construed literally, and that the bar may be lifted by a motion for reconsideration or rehearing (Br. 11-13). It argues, however, that this should be the case only when the motion is filed within six months of the issuance of the final deportation order (*ibid.*). It states (Br. 11)

that it intended its concession in *Woodby* v. *Immigration & Naturalization Service,* 385 U.S. 276, to be so limited.[1]

The limitation proposed by the Service flies in the face of the long-established rule governing the time for filing an appeal or petition for review. The rule is that a motion for reconsideration or rehearing, although filed after expiration of the statutory period within which to apply for review of the underlying order, operates to extend that period, provided only that the motion is seasonably filed under the rules of the body to which it is addressed or—if filed out of time—is entertained by that body. *United States* v. *Seminole Nation,* 299 U.S. 417, 419-21; *Bowman* v. *Loperena,* 311 U.S. 262, 265-66 (cited with approval in *United States* v. *Healy,* 376 U.S. 75, 78); *Texas & Pacific Ry. Co.* v. *Murphy,* 111 U.S. 488; *Wayne Gas Co.* v. *Owens Co.,* 300 U.S. 131, 136-38; *Brockett* v. *Brockett,* 2 How. 238; *Railroad Co.* v. *Bradleys,* 7 Wall. 575, 577-78.

Petitioner's motion for reconsideration was seasonably filed under the regulations of the Attorney General which permit such motions to be made at any time prior to the alien's departure (Pet. 3, 7). Hence, under the rule of the foregoing cases, the validity of the order for petitioner's deportation was open for review on her petition for review in the court below.

The Service relies on *Bregman* v. *Immigration & Naturalization Service, supra,* for the rule which it proposes. There the motion to reopen was filed within six months of the deportation order, and review sought within six months after denial of the motion. *Bregman* held (at 402) that, "It

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[1] The Service says (Br. 11) that this intention—though not stated in its *Woodby* brief—is inferable from the citation of *Bregman* v. *Immigration & Naturalization Service,* 351 F.2d 401. The inference evidently escaped at least one member of the Court (Justice Clark, dissenting in *Woodby,* at 291) as it did counsel for petitioner here.

follows from *Giova*"[2] that the court had jurisdiction to review the validity of the deportation order. *Bregman* did not, and had no occasion to, consider what would have followed from *Giova* had the motion to reopen been filed *more* than six months after entry of the deportation order. Plainly, however, under *Giova*, the *Seminole Nation* line of cases, *supra*, and the regulations of the Attorney General, this circumstance would not have affected the scope of review.[3]

The Service denigrates petitioner's motion for reconsideration as "a device to circumvent" the time bar of section 106 (Br. 8). But it is a "device" which the Attorney General has legitimized by regulations which permit such motions to be filed so long as the alien has not been deported (see Pet. 7). Surely the Service has no ground for objection to petitioner's use of a device supplied her by the Attorney General.

The Service also intimates (Br. 7-8, 12) that petitioner's motion lacked "good faith" and a "*bona fide* purpose" because (Br. 7) a ruling of unconstitutionality could not be "seriously expected from the Board with respect to a statute which it administers." But section 106 made application to the Board for reconsideration on constitutional grounds a prerequisite to judicial review of petitioner's

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[2] *Giova v. Rosenberg*, 379 U.S. 18.

[3] The Service (Br. 8, 12) also cites *Lopez* v. *Immigration & Naturalization Service*, 356 F.2d 986, and *Chul Hi Kim* v. *Immigration & Naturalization Service*, 357 F.2d 904. Neither is applicable. *Lopez* affirmed an administrative order denying a motion for reconsideration because the alien had presented nothing "that was not known and available to him at the hearing which resulted in the order of deportation." Here, in contrast, none of the constitutional decisions on which petitioner relies (Pet. 10-15) were known or available until long after six months from the final deportation order. *Chul Hi Kim* simply adopts the position taken by the Service in *Giova* (see Br. 9), later abandoned by it in *Woodby* (see Br. 11), that the time limitation of section 106 should be literally construed.

constitutional challenge. Petitioner cannot be guilty of bad faith for pursuing the only avenue of review open to her under the Act.[4]

As petitioner pointed out (Pet. 7-8) no such avenue is afforded by habeas corpus because the Attorney General has no authority to take her into custody for any purpose. The Service assumes that such authority exists (Br. 13, n. 14). But since the assumption is without foundation, and none is cited, the remarks of the Service (*ibid.*) about the availability to petitioner of habeas corpus prior to deportation are fatuous.[5]

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[4] The Service acknowledged below that if the proceeding were remanded to the special inquiry officer for reconsideration of the evidence of deportability in the light of the *Woodby* standard, "the remand would successfully eliminate any jurisdictional question if it ultimately were to result in a new order sustaining the deportation charge since at that time petitioner could, without question, come into this Court on a timely petition for review" (Respondent's Memorandum in Support of Motion to Dismiss, p. 10). But it would be absurd to require petitioner and the Service to go through a mock rehearing on an issue that both recognize to be frivolous (A.R. 6, 2-3; A.R. 5, 3; Pet. 4-5; Br. 3-5, ns. 3, 5, 6) in order to give the reviewing court jurisdiction over the substantial constitutional questions which petitioner's motion for reconsideration presents.

[5] While petitioner cannot be taken into custody, she would be liable to a ten year sentence for failure to present herself for deportation if deportation becomes feasible. Section 242(e). She could litigate her constitutional claim in a prosecution under that section. Section 106(a)(6). But the risk of conviction is an extortionate price for the right of judicial review. Moreover, section 242(e) has constitutional infirmities of its own, so that petitioner's challenge to the statute authorizing her deportation might not be reached. See *United States* v. *Spector*, 343 U.S. 169, 174 (dissenting opinion of Justice Jackson).

The Service also ignores the restraints on petitioner's liberty currently imposed by the order of supervision issued under section 242(d) of the Act. See Pet. 8.[6]

Thus the Service's restrictive construction of section 106 completely disregards "the vital importance of keeping open avenues of judicial review of deprivations of constitutional right." *Sibron* v. *New York*, — U.S. — (June 10, 1968). Certiorari should be granted to consider keeping these avenues open to aliens.

2. Constitutionality

The Service (Br. 7, n. 8) writes off petitioner's constitutional challenge as unimportant, stating that the "membership" test of the Statute, as construed in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Gastellum-Quinones* v. *Kennedy*, 374 U.S. 469, "clearly comports with recent expression of constitutional standards."

This statement is patently untrue. Whatever else the *Rowoldt* standard of "meaningful association" may involve, it does not require proof that the alien knows the Communist Party to have an unlawful purpose, intends to effectuate such purpose, and engages in activity to that end. See *Gastellum-Quinones* at 473-74, 476-78. Thus the

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[6] Petitioner could secure a forum for her constitutional challenge by violating the order of supervision and incurring prosecution under section 242(d). See section 106(a)(6). But this avenue of judicial review is both objectionable and uncertain for the reasons stated in the previous footnote. Subsequent to the filing of the petition for certiorari herein, the District Court granted summary judgment for the defendant in *Dymytryshyn* v. *Esperdy*, No. 66 Civ. 2375, S.D.N.Y., in which petitioner and others sought to enjoin enforcement of the orders of supervision to which they are subject. See Pet. 8, n. 6. The plaintiffs in that case (who are represented by counsel for petitioner here) are appealing the judgment of the three judge court to this Court.

evidence of petitioner's deportability clearly satisfied the *Rowoldt* standard (R. 31). But cf. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (Pet. 13), invalidating the passport sanction of the Subversive Activities Control Act both on its face and (at 515) as applied to the then chairman of the Communist Party who, like petitioner, had been convicted under the Smith Act. See *United States* v. *Flynn*, 216 F.2d 354, to which the Service refers (Br. 4, n. 3).

Moreover, neither *Rowoldt* nor *Gastellum-Quinones* touch upon the constitutional objections to the Statute which arise from its specification of the Communist Party by name. See Pet. 13-14, 15, 15 n. 19.

Finally, neither of these cases reexamined the antiquated doctrine on which *Galvan* v. *Press*, 347 U.S. 522, rests (Pet. 11-13) that aliens are without constitutional protection against deportation on any grounds that Congress may choose to specify.

Respectfully submitted,

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